Supreme Court, U.S.
FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 669, et al

MUNICIPAL DISTRIBUTOR GROUP, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

BRIEF OF HUMBLE OIL & REFINING COMPANY IN OPPOSITION

MARTIN N. ERCK
JOHN R. REBMAN
ROBERT L. NORRIS
KIRBY ELLIS
P. O. Box 2180
Houston, Texas 77001
SHERMAN S. POLAND
JAMES D. MCKINNEY, JR.
DANIEL P. COLLINS
ROSS, MARSH & FOSTER
725-15th Street N.W.
Washington, D. C. 20005

Attorneys for Humble Oil & Refining Company

October 14, 1970

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002.

INDEX

	Page
Questions Presented	2
Statement of the Case	3
Argument	4
1) The Nation's Gas Supply.	5
2) The Commission Must be Given Freedom to Re-examine its Regulatory Methods.	6
3) The Court of Appeals has Ample Equitable and Remedial Power to Affirm the Commission's Opinion While Permitting the Commission to Take Action Consistent with the Court's Opinion.	10
4) The Disposition of this Case by the Court of Appeals was Reasonable.	15
5) The Remedy Provided by the Court of Appeals Does Not Involve "Reparations" or "Retroactive Ratemaking".	19
6) Supreme Court Review is Premature.	21
Appendices	

TABLE OF AUTHORITIES

CASES	Page
Adams v. United States, 317 U.S. 269 (1942)	13
Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co., 284 U.S. 370 (1932)	21
Board of Governors of Federal Reserve System v. Transamerica Corp., 184 F.2d 311 (9th Cir. 1950), *cert. denied* 340 U.S. 883 (1950)	13
C. E. Niehoff & Co. v. FTC, 241 F.2d 37 (7th Cir. 1957), *rev'd on other grounds sub nom.*, 355 U.S. 411 (1958)	11, 16
FPC v. Idaho Power Co., 344 U.S. 17, *reh. denied*, 344 U.S. 910 (1952)	16
Ford Motor Co. v. NLRB, 305 U.S. 364 (1939)	13, 16
Hormel v. Helvering, 312 U.S. 552 (1941).	14

CASES	Page
International Union v. Eagle-Picher M &.S Co., 325 U.S. 335 (1945)	21
Mobile Gas Service Corp. v. FPC, 215 F.2d 883 (3d Cir. 1954), *aff'd sub nom., United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956)	14
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951)	21
NLRB v. Boss Manufacturing Co., 107 F.2d 574 (7th Cir. 1939)	11
NLRB v. Cherry Cotton Mills, 98 F.2d 444 (5th Cir., 1938), *reh. denied*, 98 F.2d 1021 (1938)	11
Natural Gas Pipeline Co. of America v. FPC, 28 F.2d 481 (7th Cir. 1942)	12
New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co., 332 F.2d 346 (3d Cir. 1964), *aff'd sub nom.*, 381 U.S. 311 (1965)	11
Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (D.C. Cir. 1967)	17, 18
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	6, 7, 8, 10, 17
Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942)	11
Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958)	21
United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965)	20
United States v. Morgan, 307 U.S. 183 (1939)	16, 17

STATUTES	
All Writs Act, 28 U.S.C., Section 1651(a)	13
Natural Gas Act, Section 19(b), 15 U.S.C. §717r(b)(c)	11, 12, 15

ADMINISTRATIVE DECISIONS	
Area Rate Proceeding (Hugoton-Anadarko Area), Docket Nos. AR64-1, *et al.*, Opinion 586, issued September 13, 1970, ____FPC____	5

IN THE

Supreme Court of the United States

October Term, 1970

Nos. 669, 691, 692, 680, 681, 682, 683, 684 and 685

MUNICIPAL DISTRIBUTOR GROUP, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF HUMBLE OIL & REFINING COMPANY IN OPPOSITION

Respondent, Humble Oil & Refining Company ("Humble"),[1] opposes the petitions for writ of certiorari filed by the Municipal Distributor Group (MDG), No.

1. Humble, a petitioner in the proceedings below, is a respondent only here, not having joined in any of the petitions for writ of certiorari.

669, the Associated Gas Distributors (AGD), No. 691, and The Public Service Commission of the State of New York (NYPSC), No. 692, all of which relate to the opinion of the Court of Appeals for the Fifth Circuit issued March 19, 1970, in No. 27492 and its order on rehearing issued June 16, 1970. Petitions for writ of certiorari or conditional cross-petitions have also been filed by Continental Oil Co., *et al.*, No. 680; Texaco Inc., No. 681; The California Co., a Division of Chevron Oil Co., No. 682; Bradco Properties, Inc., *et al.*, No. 683; E. Cockrell, Jr., No. 684; and The Superior Oil Co., No. 685. Humble also opposes the granting of these petitions.[2]

The conditional cross-petition filed by Texaco Inc. adequately sets out the opinions below, jurisdiction, and statutes involved, and, for brevity, Humble adopts those statements.

QUESTIONS PRESENTED

(1) Did the court below act according to law and reasonably in exercising its equitable powers in sustaining the Commission in full when it held that the Commission could, in implementing the court's opinion with regard to the interrelationship of price and supply, apply the final result of such implementation to all rates involved in the proceedings under review?

(2) Are issues as to the validity of Commission action ripe for review by this Court where the court below, in affirming a Commission area rate opinion, outlined the

---

2. With the filing of its petition, Continental Oil Company submitted a number of appendices containing, among other things, the opinions and judgment below, the opinions of the Federal Power Commission and the statutes involved. References in this brief shall be made to the pertinent portions of the "Cont. App."

rationale which the Commission should apply and the Commission has, pursuant to the court's suggestion, continued a stay of its own area rate order pending implementation of the court's opinion but has not yet issued a final order?

(3) When, by reason of stays ordered by a reviewing court and issued by the Commission, rates prescribed by a Commission opinion have never been made effective would entry of a Commission order implementing the reviewing court's opinion constitute reparations?

STATEMENT OF THE CASE

Humble adopts the Statement of the Case in the conditional cross-petition filed by Texaco Inc., *et al.*; subject however, to the following qualifying and supplemental statement. The petition for rehearing in the court below filed by Humble did not question the Commission's power to take appropriate action in light of affirmance, and expressly did not urge reversal and remand. Humble carefully limited its petition for rehearing in the court below urging that affirmance of Opinion No. 546 is appropriate provided that the guidance afforded by the court's opinion is sufficiently explicit to assure that the Commission would give adequate consideration to the gas supply problem and fashion an appropriate remedy prior to the time at which prescribed rates are permitted to go into effect. Thus, the blanket assertions of AGD (Br., p. 5), MDG (Br., p. 10), and NYPSC (Br., p. 13) that all producer petitioners requested a remand because affirmance "would preclude the Commission from re-examining revenues from gas that has already been delivered" (AGD Br., p. 5) are unfounded. On the contrary,

Humble strongly urged that affirmance would be appropriate in the circumstances of this case.

By reason of successive stays issued by the Commission and the court below, Opinion No. 546 rates have never been made effective.[3] The Commission has before it a motion for consolidation of AR61-2 (the original Southern Louisiana Area Rate Proceedings in which Opinion No. 546 was issued) with AR69-1 (the second round of Southern Louisiana Area Rate Proceedings commenced March 20, 1969) where extensive evidence of the gas supply shortage and the effect of price on supply has been adduced. Thus, by appropriate action, the Commission may promptly implement the lower court's opinion and modify its schedule of rates prescribed in Opinion No. 546, if the evidence supports such action. However, until action is taken, no one can foretell what, if any, issue will be presented for review. Significantly, settlement discussions have been instituted under the aegis of the Commission which may resolve all issues with respect to the rates here under review (see App. B, The California Company Petition in No. 682, pp. 16-30).

ARGUMENT

All petitions for writ of certiorari, both unconditional and conditional, should be denied. This Nation faces an unprecedented energy shortage, including woefully inadequate supplies of natural gas required to meet the burgeoning demands of consumers. Such demands are compounded by environmental considerations calling for

3. See "Order Staying Rate Reductions," issued May 29, 1969; order of Court of Appeals for the Fifth Circuit in Nos. 27492, *et al.*, filed October 10, 1969; and "Order Continuing Stay" issued by the Commission on July 2, 1970.

increased substitution of clean-burning natural gas for other energy sources having greater air pollution potential. No party questions the validity of the lower court's rationale that a Commission area rate opinion must be based upon an analysis of the effect of prices upon gas supply. The court of appeals decision would return this problem to its origin, the Federal Power Commission. Early denial of all petitions will be the most effective method of returning this case to that forum in order that the agency may take action to minimize the extent and duration of the gas supply crisis.

1. The Nation's Gas Supply.

In its latest area rate decision (and first since its decision under review here), the Commission has aptly described the current status of energy in general and gas in particular:

> "All major sources of energy in the United States are currently in short supply.
>
> * * *
>
> "With declining gas reserves and an increasing disparity between demand and available supply, we are confronted with the unpleasant prospect that consumption of natural gas must be curtailed or end use controls imposed unless additional sources of supply can be found or alternative sources of energy developed to meet demand. There is little prospect that alternative energy sources will reduce the demand for gas in the next decade."[4]

4. On September 18, 1970, the Commission issued its Opinion and Order Determining Just and Reasonable Rates for Natural Gas in the Hugoton-Anadarko Area; Docket Nos. AR64-1, Opinion No. 586. The portion of that opinion dealing with supply and demand appears as Appendix A hereto.

This "increasing disparity between demand and available supply" has long been forecast by this Respondent and other producers. It has been clearly signalled by the decline in gas exploration by 34% since 1960 and the decline of the reserves-production ratio from 20.1 to 13.1 over the 1960-1969 period.[5]

Given the harsh facts of the gas supply shortage, as recognized by the Commission, the important question for this Court is to determine the most efficient and effective method of allowing the Commission to take all lawful action available to avert or minimize this shortage. This Court has emphasized that ". . . Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission . . . ." (*Permian Basin Area Rate Cases*, 390 U.S. 747 at 767 (1968).

This informed judgment can be most quickly and efficaciously brought to bear on the gas supply problem by denial of the petitions for writ of certiorari.

2. The Commission Must Be Given Freedom To Re-examine Its Regulatory Methods.

In its *Permian* decision, this Court emphasized:

(1) "area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences." (390 U.S. at 772)

---

5. The producer concern over the decline of this ratio has become a stark reality to the entire natural gas industry despite the earlier label of "neurotic preoccupation." (See *Permian*, 390 U.S. at 817, n.103.) At the current level of 13.1, interstate pipelines are ". . . unable to procure contracts for new supplies of gas, on a spot or long-term basis, at the same relative rate as heretofore: . . ." Notice of Rulemaking, R-389A, issued July 17, 1970, p. 1, Appendix B hereto.

(2) the *Permian* proceeding was "to be merely the first of many steps toward a more expeditious and effective system of regulation." (390 U.S. at 772, n.37)

(3) that the Court was "obliged at this juncture to give weight to the unusual difficulties of this first area rate proceeding; we must, however, emphasize that this weight must significantly lessen as the Commission's experience with area regulation lengthens." (390 U.S. at 792)

(4) the Court assumed "that the Commission will continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate making orders." (390 U.S. at 816, n.99); and

(5) "We do not suggest that the Commission need not continuously evaluate the revenue and other consequences of its area rate structures. A principal advantage of area regulation is that it centers attention upon the industry's aggregate problems, and we may expect that as the Commission's experience with area regulation lengthens, it will treat these important questions more precisely and efficaciously." (390 U.S. at 822)

In its decision in Opinion No. 546, the Commission placed strong if not complete reliance on the regulatory methods it had earlier adopted in its Permian Basin decision. The current Southern Louisiana decision was issued five months after the Supreme Court had handed down its opinion in *Permian* and the Commission's final opinion on rehearing was a full ten months thereafter. During the period pending rehearing, the Commission was informed from every quarter of the industry of the im-

pending gas shortage and the need for Commission consideration of such fact in its decision.[6]

Despite these admonitions, the Commission's opinion here was a substantial replay of its own Permian opinion without making the reassessments required by this Court. The court of appeals expressed that it was disturbed by the "excessive reliance by the Commission upon the mere *result* of the *Permian* decision" (Cont. App. A, p. 60). The essence of the court of appeals decision was that the Commission had failed to progress in its second area rate case and thus had failed to comply with the requirements of the Supreme Court's *Permian* decision. The court of appeals stated with great specificity the areas where the Commission had failed to improve on its Permian methodology, summarizing to state:

> "It should first estimate the needs of consumer service —in this case, the demand for gas. Next, it should use this determination to fix the level of service at which it is aiming, explaining how that level is related to actual demand in the event demand is not to be fully satisfied. It must then make findings, as specifically as possible, as to how the rate it has set will affect the industry's tendency to meet that level of service." (Cont. App. A, p. 68)

The failure of the Commission's "Permian" regulatory methodology is now widely recognized. The supply trends referred to earlier establish that, insofar as the Commission's Permian decision was the bellwether to the gas producing industry, such methodology has led to a failure of gas supply to meet the Nation's demands.

---

6. See Appendices to Petition for Writ of Certiorari filed by The California Company, pp. 56-87, for documentation of these matters.

Now, the Commission itself has recognized that drastic changes in its approach to producer price regulation must take place. It has inaugurated a rulemaking proceeding to establish initial rates for future sales of natural gas for all areas of the Nation.[7] Many parties, including distributors and pipelines, have recommended price increases ranging from 5 to 10¢ per Mcf for various areas of the Nation, including Southern Louisiana.

The voices in judgment of the Commission's Permian methodology now include the Commission's Office of Economics. In an August, 1970 submittal to the Commission in such rulemaking proceeding, this office stated:

> "The recent course of area rate regulation has opened a gap between what is sought and what is actually being achieved. (1) New contract prices are being restrained by ceilings below a level consistent with supply-demand equilibrium in the interstate market. (2) Supplemental supplies are being imported at higher prices than can be offered to domestic producers. (3) At the same time that the regulated interstate market is adjusting to shortages, the unregulated intrastate market, which can pay the necessary price to attract new supplies, is flourishing. (4) Instead of price certainty, regulation has fostered the growth of price expectations which favor the postponement of new dedications of reserves and new capital commitments. Taken together, these developments contain the seeds of a serious regulatory crisis.
>
> "Prompt and decisive Commission action is required to bring order into the regulatory disarray and to prevent long-term resource misallocation in the national economy."[8]

7. This Notice of Rulemaking in this Docket No. R-389A is appended as Appendix B hereto.

8. This submission is reproduced in full in Appendix C hereto.

Finally, the Commission's request to the court of appeals for a remand so "that the Commission can discharge its regulatory responsibilities consistent with the court's opinion" is indicative that the Commission desires to re-evaluate the approach to producer area rate regulation exemplified in its Permian decision.

Under these circumstances, the earliest possible action is required to allow the Commission to commence a new tack in seeking the key to a regulatory method which will ". . . employ price functionally in order to achieve relevant regulatory purposes. . ." (*Permian*, 390 U.S. at 797). This can best be accomplished by denial of all petitions, allowing the affirmance and instructions of the court of appeals to stand.

3. The Court of Appeals has Ample Equitable and Remedial Power to Affirm the Commission's Opinion While Permitting the Commission to Take Action Consistent With the Court's Opinion.

All Petitioners present a question which AGD states succinctly:

> "Whether a reviewing court acting pursuant to §19(b) of the Natural Gas Act may affirm a rate order of the Federal Power Commission, and at the same time exercise general equity powers to authorize the Commission to make retrospective adjustments in the rates fixed by such order."

Humble, in the context of *this case*, unqualifiedly answers the question in the affirmative.

In denying the various petitions for rehearing the court below relied upon the broad equitable and remedial

powers embodied in Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b). Thus, it stated (Cont. App. B, p. 2):

> "Under Section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so."

MDG, AGD, and NYPSC argue that such action is unlawful. But Section 19(b), which empowers the courts of appeals to "affirm, modify or set aside [a Commission] order in whole or in part," contains a broad grant of equitable jurisdiction and affords ample authority for the court's decision in this case. In this regard, the courts of appeals sitting pursuant to Section 19(b), have equitable and remedial powers coextensive with those of a trial court of original jurisdiction in an injunction suit.[9]

---

9. The courts of appeals are courts of inherent equitable power. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S 4, 17 (1942). Moreover, it has traditionally and consistently been recognized that in reviewing the propriety of and entertaining applications for enforcement of orders of the National Labor Relations Board and the Federal Trade Commission, the courts of appeals exercise equitable jurisdiction and powers, under review proceedings substantially the same as those brought under Section 19(b) of the Natural Gas Act. See, *e.g., NLRB v. Cherry Cotton Mills*, 98 F.2d 444, 447 (5th Cir. 1938) *reh. denied*, 98 F.2d 1021 (1938); *NLRB v. Boss Manufacturing Co.*, 107 F.2d 574, 579 (7th Cir. 1939); and *C. E. Nichoff & Co. v. FTC*, 241 F.2d 37, 42 (7th Cir. 1957) *rev'd on other grounds sub nom.*, 355 U.S. 411 (1958); *New Jersey Wood Finishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F.2d 346, 355 (3rd Cir. 1964), *aff'd sub nom.*, 381 U.S. 311 (1965).

Thus, it was early held in *Natural Gas Pipeline Co. of America v. FPC*, 128 F.2d 481, 484 (7th Cir. 1942):

> ". . . it [is] well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. [Citations omitted]."

The *Natural* case brings into sharp focus the broad reach of the equitable powers of the courts of appeals when their jurisdiction is invoked under Section 19(b) of the Act. In that case, the court found that it had the equitable power to regulate the disposition of refunds payable as a result of a stay order previously issued by it as well as the equitable power to enjoin the putative recipients of such refunds from prosecuting collateral suits in other forums.

The *Natural* decision makes clear that a court of appeals whose jurisdiction is invoked under Section 19(b) of the Act[10] sits as a court of original jurisdiction and pur-

10. The court in the *Natural* case made clear that its powers derived from the Natural Gas Act, stating:

> "The source and boundaries of our authority must be found in the Natural Gas Act, 15 U.S.C.A. § 717r(b)(c), providing that persons aggrieved by an order of the Commission may obtain a review in the proper Circuit Court of Appeals, which shall have exclusive jurisdiction to affirm, modify or set aside the order in whole or in part, and the judgment of which shall be final, subject only to review by the Supreme Court. . . . Thus the Circuit Court of Appeals is the first forum in which a judicial hearing can be had to determine the legality of the order. In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission; the National Labor Relations Board and various other administrative bodies." 128 F.2d 483-84.

suant to its authority to "affirm, modify or set aside" a Commission order, has the equitable power to do complete justice. Since a court has the equitable jurisdiction to ". . . protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit," 128 F.2d 484, when its jurisdiction is invoked under Section 19(b), a fortiori, a court sitting in such capacity has the inherent power to effect the most perfect remedy.[11]

In *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939), the Supreme Court recognized this precise principle. There, upon review of a circuit court decision remanding a case to the Labor Relations Board to permit it to set aside its opinion and to make new findings, the Court stated at 305 U.S. 373:

> "The jurisdiction to review the orders of the Labor Relations Board is vested in a Court with equity powers, [i.e., the court of appeals] and while the

11. Even assuming, *arguendo*, that the court below was without inherent equity power or that Section 19(b) did not confer equity power upon it, nonetheless, the court would have ample authority under the All Writs Act, 28 U.S.C. §1651(a) to grant the relief which it did. That Section empowers the courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The cases are legion in a variety of contexts, that this Act empowers the courts of appeals, when it has jurisdiction of the cause, to issue all writs not specifically provided for by Congress in the enabling legislation when the court finds it necessary "to achieve the ends of justice entrusted to it." *Adams v. United States*, 317 U.S. 269, 272-73 (1942). See, also, *Board of Governors of Federal Reserve System v. Transamerica Corp.*, 184 F.2d 311, 316 (9th Cir. 1950); *cert. denied*, 340 U.S. 883 (1950), where that court of appeals, pursuant to the All Writs Act, and where it had no jurisdiction of the cause, issued an order enjoining the transfer of stock which transfer would have divested the Board of jurisdiction and the court of jurisdiction to enforce any order of the Board.

> court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of judicial review is consonant with that of the administrative proceedings itself,—to secure a just result with a minimum of technical requirements."

The courts of appeals have correctly applied their equitable powers in the past to create innovative remedies. For example, in *Mobile Gas Service Corp. v. FPC*, 215 F.2d 883 (3d Cir. 1954), *aff'd. sub nom, United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the Court of Appeals for the Third Circuit "reversed the Commission's order, directed it to reject United's filing of the new schedule insofar as it purported to increase the rate in question, and held Mobile entitled to a return of the amounts paid in excess of the contract rate." 350 U.S. at 337. The court took this action under Section 19(b) which is couched in terms which permit the court to "affirm, modify or set aside" a Commission order.[12]

Moreover, a court of appeals has broader jurisdiction where, as in this case, parties have moved to adduce additional evidence. Thus, Section 19(b) gives the courts express authority to "order such additional evidence to be taken before the Commission and to be adduced upon the hearing *in such manner and upon such terms and conditions as to the court may seem proper.*" (Emphasis

---

12. Cf., *Hormel v. Helvering*, 312 U.S. 552, 560 (1941), where the Supreme Court affirmed the decision of the lower court and at the same time ordered further proceedings consistent with its opinion, *i.e.*, it affirmed with directions.

supplied). That is precisely what the court below instructed the Commission to do when it stated:

> "In our original opinion, we indicated that there was new evidence of a possible impending gas supply shortage" (Cont. App. B, p. 1).
>
> * * *
>
> "The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission" (Cont. App. B, p. 2).
>
> * * *
>
> "Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders" (Cont. App. B, p. 3).

In substance, the court's "judgment" that the Commission had "the duty" to consider "what parts of its orders must be reopened in light of new evidence" of gas supply shortage constitutes an exercise by the court of its power under Section 19(b) to require the Commission to consider material new evidence and to make such changes in its orders as the new evidence may require.[13]

4. The Disposition of This Case by the Court of Appeals Was Reasonable.

Once it is established that the courts of appeals exercise equitable jurisdiction, their formulation of remedies must

13. NYPSC's assertion that producer motions to adduce were denied "sub silentio" (NYPSC Pet., p. 12, n. 2 and p. 16, n. 5) is obviously unfounded.

necessarily be construed in light of the purposes of the Act and their role in the administrative process.[14]

The court's action in this case must, therefore, be related to and viewed in the context of the unique and critical problem with which it was confronted. Having found that affirmance of the Commission's decision was required but that the Commission made insufficient findings with regard to the relationship of producer rates and supply, the court exercised its inherent equitable and remedial powers to effectuate the best solution possible in the circumstances. It did not improperly arrogate to itself an administrative prerogative or perform an essentially administrative function.[15] Nor did it attempt to transfer its equitable powers to the Commission. See, *Ford Motor Co. v. NLRB*, 305 U.S. at 372.

Here, cognizant of its role in the administrative process, the court below, after a carefully considered opinion, affirmed the Commission's decision but, pursuant to the court's broad equitable powers and consistent with the comity which must exist between court and agency, permitted the Commission to make retrospective as well as prospective adjustments should the public interest so require. Thus, it stated (Cont. App. B, pp. 2-3):

> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has

14. *United States v. Morgan*, 307 U.S. 183, 191 (1939).

15. Cf. *FPC v. Idaho Power Co.*, 344 U.S. 17, *reh. denied*, 344 U.S. 910 (1952); *C. E. Niehoff & Co., v. FTC*, *supra*, at note 9.

> ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders."

Plainly, the court properly exercised the discretion delegated to it by Congress and its action is appropriately related to the underlying purpose of the Act.

Thus, recognizing the complex nature of these area rate proceedings,[16] the lower court's solution providing affirmance but incorporating the rationale to be followed in weighing the interrelationship of supply and price into its remedy is a reasonable solution assuring fairness of the end result under proper court supervision. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968); *United States v. Morgan,* 307 U.S. 183 (1939); *Niagara Mohawk,*

---

16. This area rate proceeding, like the *Permian Basin Area Rate Cases* decided by this Court in 1968, is an immensely complex proceeding involving dozens of parties. The record consists of more than 34,000 pages and over 300 exhibits with a printed joint appendix exceeding 1,000 pages. The proceedings, which were instituted in May, 1961, were not decided by the Commission until September 25, 1968. They involve 252 respondents to investigations under Section 5(a) of the Act and 119 Section 4(e) rate increase proceedings. As noted by the Commission in its Opinion, 84 producer-respondents, 2 State commissions, 10 interstate pipelines, 111 gas distributors and a number of other interested parties participated in the administrative proceedings. At the court of appeals level, the issues remained complex, involving such questions as costing, allocations, rate design, rate of return, rate moratoria as well as the all-prevailing issue of gas supply. The number of participating parties remains at a high level.

Power Corp. v. FPC, 379 F.2d 153, 160 (D.C. Cir. 1967).

The central issue presented to the court below was the effect of the decision on gas supply in the important Southern Louisiana Area as well as the nation. No one can doubt this paramount fact and no court decision can disregard it. All efforts of the gas producing industry and the Commission must be directed toward a swift solution of the deepening gas supply crisis.

In the context of the Commission's failure to provide any meaningful analysis of the effect of price upon supply (Cont. App. A, pp. 46-60) the court took an immensely practical step. It recognized that it could have ordered a limited remand (Cont. App. A, p. 56) but decided that a realistic solution would be expedited by affirmance, while making Commission consideration of the supply issue a part of its remedy (Cont. App. A, pp. 65-70). It was aided in this conclusion by the knowledge that by this time the Commission itself had come to realize that its end result must be directed toward resolution of the supply crisis (Cont. App. A, pp. 56-58). Yet the court below took pains to point out that its mandate "should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here." (Cont. App. A, p. 69) And, on rehearing the court carefully avoided intrusion into the administrative sphere concluding that it is the Commission's function to decide what, if any, modification of Opinion No. 546 is required in light of the court's opinion.

5. The Remedy Provided by the Court of Appeals Does Not Involve "Reparations" or "Retroactive Ratemaking."

MDG, AGD and NYPSC do not contest the soundness of the lower court's opinion insofar as it requires that the Commission consider the relationship of price and supply. Nonetheless, they argue that the Commission is powerless to effect the remedy prescribed by the court of appeals. They would force the Commission, the gas industry, and all dependent upon it to accept a result which cannot be justified by application of standards which even they do not dispute. However their argument is based upon an erroneous premise; to wit, that Opinion No. 546 rates have become fixed, subject only to prospective change. They, therefore, contend that any retrospective modification of Opinion No. 546 rate levels would constitute reparations beyond the power of the Commission. Their argument overlooks the fact that Opinion No. 546 rates have never become effective. Continuous stays have left the Commission free to take the necessary action to effectuate the court of appeals' directives. Thus neither reparations nor retroactive ratemaking are involved.

Importantly, the operative language of the lower court's order on rehearing does not suggest the possibility of retroactive rate-making or reparations. Thus, the court held (Cont. App. B, p. 2):

> "The Commission can make *retrospective* as well as prospective adjustments in this case if it finds that it is in the public interest to do so." (Emphasis supplied).

Under the Natural Gas Act, the difference between retroactive rate-making or reparations and the fixing of

rates on a retrospective basis is clear. Reparations involve the fixing of rates for a past period in substitution for prior rates which had become effective without contingency for modification or change. In sharp distinction, the Commission can and regularly does fix rates on a retrospective basis. Thus, when an increased rate is permitted to go into effect subject to possible refund, the Commission may, after hearing, fix a just and reasonable rate retrospectively to the end of the suspension period; this does not constitute "ordering reparations."

Similarly, and most pertinent here, the Commission may, when it has never permitted rates to go into effect, make appropriate retrospective adjustments in rates as may appear appropriate on the basis of Court review.[17] Since, by reason of its stay, the Commission has prevented the Opinion No. 546 rates becoming effective, the Commission may now take the proper action as may be appropriate under the Court's opinion.

Petitioners who argue that modification of Opinion No. 546 rate levels would result in reparations fail to recognize that the retrospective effect would be the same when, upon completion of review, *any* rates other than those now in effect are made effective as of a prior date. The effect is identical; the only question is whether the rates so given effect are the Opinion No. 546 rates or different rates which might follow from application of the guidelines furnished by the court below. The nature of the Commission action would be identical because present rates are effective subject to possible refund, and Opinion No. 546 rates have never been made effective. Accord-

17. Cf. *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965).

ingly, cases such as *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932) and *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), cited by Petitioners, are inapposite, because they involved retroactive changes in rates which had been both established *and* placed in effect.

In the context of the proceedings in this case the distinction between prohibited retroactive rate making and appropriate retrospective action is crucial. Having never made effective any part of the rate reduction or refund orders in Opinion Nos. 546 and 546-A, there can be no "retroactive" character imparted to the post-review actions which the Commission is authorized to take under the court of appeals' opinion.[18]

6. Supreme Court Review is Premature.

Because of the particular circumstances involved, this case presents no issue which is ripe for review. Until the Commission acts to implement the court's opinion, no party can be affected. And, until the Commission acts, no party can foretell which issues, if any, will be relevant. Viewed realistically, there is no final Commission action to which this Court should devote its attention. The Commission's stay of the rate provisions of Opinion No. 546 after the court of appeals' mandate was handed down, its encouragement of settlement negotiations, and its patent

18. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) and *International Union v. Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945) are not in point for those cases involved collateral attack upon orders which had been unconditionally approved upon review. In contrast, no collateral attack upon the lower court's opinion would be involved here when the Commission follows the court's rationale in relating price to supply to derive the just and reasonable rates applicable in these proceedings.

recognition that a solution must be found to the critical gas supply crisis, all forecast that the Commission will heed the lower court's opinion. When it has done so, the end result may be entirely different from Opinion No. 546. Moreover, denial of certiorari now does not foreclose parties from pursuing their remedies after the Commission issues its final order in this proceeding. Avenues for review will then be open for any aggrieved party to seek to prove error. In this context the overriding public interest clearly demands that all writs of certiorari be denied so that the Commission may proceed immediately to implement the court's decision.

CONCLUSION

WHEREFORE, for the foregoing reasons, Humble requests that all petitions for writ of certiorari in these proceedings be denied.

Respectfully submitted,

MARTIN N. ERCK
JOHN R. REBMAN
ROBERT L. NORRIS
KIRBY ELLIS

P. O. Box 2180
Houston, Texas 77001

SHERMAN S. POLAND
JAMES D. MCKINNEY, JR.
DANIEL P. COLLINS

725-15th Street N.W.
Washington, D. C. 20005

Attorneys for Humble Oil & Refining Company